

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FIDELITY NATIONAL TITLE INSURANCE)
COMPANY,)
)
Plaintiff,)
)
v.) No. 4:10-CV-1890-CEJ
)
CAPTIVA LAKE INVESTMENTS, LLC,)
)
Defendant.)

MOTION HEARING

BEFORE THE HONORABLE CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

APRIL 23, 2013

APPEARANCES:

For Plaintiff: Thomas J. Fritzlen, Jr., Esq.
Shawn T. Briner, Esq.
MARTIN, LEIGH, LAWS & FRITZLEN P.C.

For Defendant: Steven D. Hall, Esq.
Richard A. Wunderlich, Esq.
LEWIS, RICE & FINGERSH, L.C.

REPORTED BY: Gayle D. Madden, CSR, RDR, CRR
Official Court Reporter
United States District Court
111 South Tenth Street, Third Floor
St. Louis, MO 63102
(314) 244-7987

1 (Proceedings began at 10:31 a.m.)

2 THE COURT: Good morning.

3 MR. WUNDERLICH: Good morning, Judge.

4 MR. BRINER: Good morning, Your Honor.

5 THE COURT: Who is here for the Plaintiff?

6 MR. BRINER: Good morning again, Your Honor. Shawn
7 Briner and Tom Fritzlen on behalf of the Plaintiff. The
8 Plaintiff is also present through its corporate
9 representative, Greg Dawley.

10 THE COURT: Would you spell the last name again,
11 please?

12 MR. BRINER: Mr. Dawley's last name is D-A-W-L-E-Y.

13 THE COURT: All right. Thank you.

14 MR. BRINER: You're welcome.

15 THE COURT: And for the Defendant.

16 MR. WUNDERLICH: Good morning, Your Honor. Rick
17 Wunderlich and Steven Hall on behalf of Captiva. We also have
18 with us representatives of the company, Mr. Ben Stegmann,
19 Mr. Dan Stegmann, and Mr. Jack Davis. We also have Tony
20 Whitledge here, Your Honor.

21 THE COURT: All right. I scheduled this hearing on
22 the motion requesting appointment of Mr. Whitledge as an
23 individual to inspect the Plaintiff's computer system, and I
24 know that you all have briefed the issue extensively, and I
25 don't want to waste your time by having you repeat everything

1 that you've put in your written pleadings, but I -- I do have,
2 I guess, some fundamental questions, and I'd like to give each
3 of you the opportunity to present your best arguments on this.
4 This is not the typical motion, and because it is -- if the
5 motion is granted it would require the Plaintiff to open its
6 computer system to, essentially, a stranger, I think it's
7 important that I know as much about this as I can. So this is
8 the Defendant's motion, so I'm going to start with the
9 Defendant. Mr. Wunderlich, are you -- can you answer a few
10 questions for me?

11 MR. WUNDERLICH: I can, Your Honor.

12 THE COURT: Okay.

13 MR. WUNDERLICH: Your Honor, just also with respect
14 to any questions you have, Mr. Whitledge is here and can
15 answer questions also if the Court would like. He is an
16 attorney, and so he's a member of the bar also.

17 THE COURT: All right. Well, if it -- if it comes to
18 that, then I will certainly ask -- direct the questions to
19 him. Tell me, what is it that -- what would you have
20 Mr. Whitledge look for in the inspection?

21 MR. WUNDERLICH: Your Honor, it's pretty simple.
22 What we would ask him to do is really focused on three
23 buckets. One is the Major Claims Reports that are missing
24 that the Court has ordered to be produced.

25 THE COURT: I'm sorry. The --

1 MR. WUNDERLICH: Major Claims Reports.

2 THE COURT: Yes, uh-huh.

3 MR. WUNDERLICH: The second is CPS documents that the
4 Court had ordered Fidelity to produce, and what we discovered
5 in as late as January -- CPS documents were produced in
6 January when they should have been produced back in September
7 when the Court ordered them to do so. You ordered them to
8 produce everything there. We believe that there are
9 additional documents that have been either removed from that
10 system or archived in that system, and when you look at the
11 affidavits and information that has been presented by Fidelity
12 in this case, they don't tell the Court or Captiva some really
13 important things. They say there's no historical data there,
14 but what they don't tell you is has anything been deleted,
15 have they gone and looked in any files for us.

16 The other thing I would point out to the Court, the
17 third bucket, would be emails. In the affidavits of
18 Mr. Dawley and other people that they've submitted in response
19 to our motion, they talk about these Major Claims Reports were
20 sent by email, they're all done electronically, they're not
21 printed, but they don't produce any emails of the supervisors.
22 Both Mr. Perna and Mr. Dickhute testified in their
23 depositions, when we first found out about these, that they
24 should supply these to their supervisors. There's not been
25 one email that I can point to the Court or that we can locate

1 where there's an email attaching the Major Claims Report to
2 the supervisor. They say here are the reports, here's the
3 excerpts from the reports, and the reports that are missing
4 are critical reports. They're right in the period of time
5 when we believe Mark Dickhute, the individual responsible for
6 handling the claim at the time, had actually made a
7 determination that there is no coverage and failed to advise
8 Captiva of that information.

9 The other point I would make to the Court is that the
10 affidavits that have been supplied in response to our motion
11 by Fidelity -- it's an affidavit from an individual by the
12 name of Matthew Rini, and, Your Honor, I have and I can
13 produce to the Court and show the Court his information that
14 he puts out on the network. He's a -- they identify him as
15 being an Assistant Vice President. His résumé doesn't
16 indicate that he has any ability to know what a system is made
17 of, to know what is behind a system. He basically puts on his
18 résumé he's an actor who specializes in legalese. He puts --
19 puts out an -- on his résumé that he is employed by Fidelity,
20 but there's nothing in his résumé that indicates he's got any
21 knowledge about computer systems, and what we have --
22 Mr. Whitley, in his affidavit, clearly has stated and has
23 provided sworn testimony by way of his affidavit that it would
24 take a special -- special training and education and
25 experience to know what a system is built on. What Fidelity

1 doesn't tell you -- they don't tell you what even the
2 underlying system is. They're trying to make you believe that
3 there's some stand-alone computer in the corner that this
4 information is on and it's not connected to anything else,
5 but, however, in a number of their affidavits, they make
6 reference to networks, they make reference to other documents,
7 and there's no indication they've searched any of that.
8 Mr. Rini doesn't say he's searched any of that or even he's
9 got the capability or the access to it. So we believe there
10 are documents that have been in the CPS system that have
11 either been removed, have been archived someplace else, and
12 Mr. Whitledge, based on what his experience has been and what
13 he's seen so far, has also attested to that in his affidavit.
14 So that's kind of an overview, Your Honor.

15 THE COURT: All right. And exactly how would this
16 inspection be performed?

17 MR. WUNDERLICH: Your Honor, that was the question I
18 had because I knew the Court would be very concerned about
19 protection of Fidelity's information. Clearly, Mr. Whitledge
20 is willing to sign any kind of protective order the Court puts
21 in place, or, you know, we're willing to do that without any
22 question, but more importantly, he's not going to get in there
23 and put his hands on computers. That's not what he intends to
24 do. What he intends to do -- and he can speak to this
25 probably much more knowledgeably than I can, Your Honor, but

1 what I understand him to do is he is going to sit down with
2 someone at Fidelity and ask them questions and ask them to
3 show him what is the basis of the underlying system, what does
4 it network to, what is it you've searched, can you search
5 this, can you go look at this, can you look in these archives
6 to find these type of things, and if there would be something
7 that would be clearly not within the scope of the Court's
8 order, that could be segregated and can be brought to the
9 Court's attention, but clearly, with respect to whether things
10 have been removed from the CPS system and what's been removed,
11 when it was removed, what emails there are, what -- what email
12 document hold process was even put in place, we've never been
13 told that by Fidelity. All we've been told is, "We can't find
14 any archived information; when I push these buttons, it
15 doesn't come up." Well, Mr. Whitledge can get in there with
16 someone from Fidelity and instruct them that he needs them to
17 look at these files, he needs them to look at this part of
18 their records and hopefully make a determination whether or
19 not things have been deleted, things can be located, or
20 whether things never existed.

21 THE COURT: Okay.

22 MR. WUNDERLICH: We have not brought this motion,
23 Your Honor, without really good foundation because based on
24 the number of documents that were supplied to us in late
25 January, after -- and about the same time our motions were

1 filed, there were -- for instance, there were 22 pages of
2 handwritten notes from a claims file or from a file that we've
3 never seen that were produced that day. We don't really know
4 what else is out there. There's also one CPS document clearly
5 that should have been produced that had been identified by
6 Fidelity in a privilege log, and all it said was -- what was
7 the proper term?

8 MR. HALL: "Note by Mark Dickhute."

9 MR. WUNDERLICH: It said, "Note by Mark Dickhute."
10 It didn't identify it as a CPS document. Well, in fact, it
11 was a brief that had been attached to CPS, but when they
12 produced the CPS documents, that wasn't in there. So we
13 clearly believe there's a good faith basis that we'll
14 determine -- that should allow us to determine whether or not
15 these things have been removed from the system, what's been
16 looked for, and we truly believe that people with knowledge
17 about the underlying system and network can access this
18 information.

19 You know, what's also glaringly missing from any
20 affidavit from Fidelity is no discussion about having a
21 conversation with any information -- you know, CFO or CIFO or
22 whatever they call them, the company information person.
23 There's -- you know, they have over 10,000 employees, Your
24 Honor, and clearly, they've got this all networked. Their own
25 claims handbook says this is the bible, you must do it this

1 way, the information is either found in the CPS system or it's
2 found in a hard file. Well, we've never been produced, quote,
3 "a hard file." We've been given these documents that are
4 called "As organized file." We truly believe that these --
5 and their own manual, claims manual, says they're supposed to
6 attach these things and keep these things in the CPS system.
7 Now they claim they don't do that. Well, then it should be
8 someplace else, and it's our belief that those things were in
9 the CPS system and somebody removed them.

10 THE COURT: Okay. Now, there is -- you've made the
11 claim that there were documents that should have been produced
12 last September that were not produced until January.

13 MR. WUNDERLICH: A year and a half ago, Your Honor.
14 But not just last September. A year and a half ago.

15 THE COURT: Okay.

16 MR. WUNDERLICH: The September before. May and
17 September of -- our first request for production was directed
18 to them on May 11th, 2011, and we specifically asked for the
19 claims file for the policy and any old documents related to
20 any evaluation of coverage under the policy, which would have
21 included all these documents.

22 THE COURT: All right. And how was it that you came
23 to receive those documents in January?

24 MR. WUNDERLICH: Judge, what happened was we took the
25 deposition of Mark Dickhute. Let me get the date so I get

1 this right. We took Mr. Dickhute's deposition on May 23rd of
2 2012. No CPS document had been identified, and no Major
3 Claims Report had been identified. During my questioning of
4 Mr. Dickhute, I asked him specifically about how he reported
5 and what he did, and in his deposition, he identifies -- do
6 you have that? Do you want to pull that up, Steve, if you
7 could, that slide? If you could give us just a minute, Your
8 Honor, I'd like to show you the slide.

9 We asked Mr. Dickhute and Mr. Perna, the two people
10 that were handling the claim, a couple of questions. One was,
11 "How do you maintain files, and what do you do?"

12 You just had it a minute ago, Steven.

13 And Mr. Dickhute says, "Well, I have a Major Claims
14 Report." Well, that had never ever been disclosed to us, Your
15 Honor, and that was the subject of a previous motion we
16 brought to the Court, and you'll see, "How do you communicate
17 with your supervisors if it didn't go through CPS system?"
18 And we had just found out about the CPS system.

19 "Normally, by telephone, and there were reports that
20 would be prepared on a monthly basis and submit them.

21 And how do you identify these reports?

22 They were called Major Claims Report.

23 And who would they be submitted to?

24 On a monthly basis, to our supervisor."

25 And Mr. Dawley has also talked about those reports

1 that he submits to his supervisor. He says he does those
2 electronically.

3 Well, again, those have not been produced. There
4 have been no emails produced. There have been no Major Claims
5 Reports from any supervisors that have been produced, and
6 there are a couple of Major Claims Reports in the key period
7 of time. There are three of them that all we've been given
8 are excerpts. We haven't been given the entire reports,
9 notwithstanding the Court's order, and the Court had entered
10 an order specifically on this issue in her order.

11 Pull up the order, Steven, please.

12 In your August 17th order, Your Honor, you required
13 them to produce the Major Claims Reports and all the CPS
14 materials at that point in time, and so after that date --
15 and, of course, that was after discovery had closed -- they
16 began producing some of this information, and we continued to
17 work with them to try to obtain the additional information.
18 We were told that we had all the CPS information at one point
19 in time, and in fact, we hadn't been given all the CPS
20 information.

21 Go to the example, Steven, of the document from Mark
22 Dickhute.

23 Your Honor --

24 Go back one, Steven.

25 It said it was listed in their privilege log as a

1 note by Mark Dickhute, so that doesn't even say CPS, but the
2 Court had ordered them to produce them in your August 17th
3 order, and then you also told them that they should continue
4 looking for this, and you instructed them to -- they
5 represented to the Court that they were working with an
6 e-discovery specialist, who turned out to be Mr. Rini.

7 They then -- we then find out in January -- go ahead
8 to the next slide -- which was produced on January 7th,
9 2013 -- this document here, which was clearly part of the CPS
10 system. Now their response is, "Well, you have the
11 information similar to that in what we've produced to you,"
12 but that begs the question. This document -- do you see where
13 it says, "Brief"?

14 THE COURT: Yes.

15 MR. WUNDERLICH: That's specifically referenced in
16 what was provided in a number of these things, but this
17 document wasn't provided. So either it was removed from the
18 system or it was located someplace else, and it's critical in
19 one respect because the entry itself says, "On November 3rd,
20 2010, instructed Martin Blanchard" -- that was the attorney
21 that was hired by Fidelity -- "that no settlements will be
22 entered into by Fidelity in light of the declaratory judgment
23 action and coverage determination. My settlement offers --
24 any settlement offers should be sent to the insured for their
25 handling."

1 Now, clearly, had we had that when we took
2 Mr. Dickhute's deposition, I could have inquired of him about
3 what the meaning of "coverage determination" was, and in fact,
4 in his deposition, he did talk about "coverage determination."
5 He had made one, is what he said, before he even filed this
6 lawsuit. So, clearly, we should have had the opportunity to
7 depose him about these things, and we don't even -- we don't
8 even see this until January 17th, and clearly, the Court had
9 ordered that this be produced.

10 So I'm not sure what else I can say on that issue.
11 I've kind of lost track of your initial question, Judge. I
12 apologize.

13 THE COURT: No. That's all right. Well, when --
14 when this document and any other documents were produced in
15 January, what was -- was any explanation given for not
16 producing them sooner?

17 MR. WUNDERLICH: The answer was, Judge, "You've been
18 provided information of the same ilk." Now, that's not
19 responsive under the federal rules, to my knowledge. Okay.
20 You can't choose and pick what you get to give to us.

21 THE COURT: So -- okay. I guess I'm -- and maybe
22 I'll save this question for the -- for Fidelity because it
23 doesn't make sense to me. If they didn't feel that these
24 documents needed to be produced earlier, why did they produce
25 them at all.

1 MR. WUNDERLICH: That's a good -- Judge, what
2 happened was we'd been complaining for months or probably a
3 year about having the claims file because -- let's go back to
4 their CPS Slide 25.

5 Your Honor, in their own claims handling book, they
6 say basically that at all times that claims are received, all
7 incoming claims are logged into CPS. From this point on, the
8 system will track claim status, reserve information, claims
9 payment, and claims resolution information.

10 Go to the next page, please.

11 They also say that, under (c) the duties of the
12 claims administrator, "Since CPS is Fidelity's sole system for
13 tracking and reporting claims-related data, it is absolutely
14 essential that all claims administrators make use of this
15 system in a consistent way and each administrator must adhere
16 to the following CPS procedures for each of these claims as
17 are listed below." So you would think you would find it
18 there, but what Fidelity's position is -- "Well, we didn't
19 really use the CPS system. We kept this stuff either in the
20 CPS system or in the hard file." And so we've said all along,
21 "Where is the hard file?"

22 Go to the timeline, please, Steven.

23 Your Honor, it's kind of -- you can't really read
24 that, Your Honor. I apologize. We have a blowup.

25 Why don't you put it over here.

1 Your Honor, just to kind of visualize this a little
2 bit, we had asked for the claims file back on May 11th of
3 2011. They filed a privilege log, their first one, on
4 9-15-11. It doesn't have these Major Claims Reports on it.
5 It doesn't have the CPS on it other than some vague
6 description that you wouldn't know it's CPS.

7 Interestingly, Mr. Dawley receives the paper file on
8 November 21st, 2011, that came from Mr. Dickhute, the one we'd
9 been asking for. Now, that's not produced until we get back
10 into -- December of 2012 is when that's finally produced to
11 us. Well -- and what is produced to us is a file that they
12 say, "As organized. You can come out and look at it. It's an
13 'As organized' file, and we'll also give you this listing of
14 documents that are in there." So we made arrangements to go
15 out there. We thought they should have produced the whole
16 file. Whether it's in fact the claims file as requested, I
17 still don't know to this day, but they produced the file, so
18 we went out there, and there are a number of things in there
19 that they now try to add to another privilege log. They keep
20 trying to add to another privilege log, and so that's how we
21 found out about a number of things, and then we protested
22 about a number of these things when we looked at the privilege
23 log and said, "That's not privileged under the Court's order;
24 you have to give that to us." And that's how we found the one
25 CPS document is just by pushing them, and this was at the same

1 time that we were filing the summary judgments in this case,
2 Your Honor, well after discovery has been completed, well
3 after we took the deposition of Lance Perna and Mark Dickhute,
4 the two major claims handlers in this matter.

5 So I mean we've not had the opportunity to take
6 meaningful depositions in this case, and their excuse is,
7 "Well, you had similar information." Well, with all due
8 respect to Fidelity on that, Your Honor, that's not the test
9 as I understand it. The test is you're supposed to disclose
10 things and you're supposed to provide things. If you have a
11 legitimate basis for it, then you need to identify it so it
12 can be explored with the Court by way of an appropriate motion
13 or you either waive it or you produce it. You don't hide it
14 from people.

15 THE COURT: Okay.

16 MR. WUNDERLICH: And, Your Honor, we still haven't
17 been provided Dawley's paper file either, the now claims
18 handler. I mean clearly in a case where you have tortious
19 interference, when you have vexatious refusal and you have a
20 coverage determination, the cases are clear that that is
21 clearly discoverable, and we should be entitled to those
22 things.

23 THE COURT: All right. Okay. Thank you,
24 Mr. Wunderlich. I think those are all the questions I have
25 for you at this point, and I'd like to hear from Fidelity, and

1 I may have some --

2 MR. WUNDERLICH: Your Honor, the only thing I would
3 say in parting also is Mr. Whitledge's affidavit clearly lays
4 out the difference between his experience and Mr. Rini's, who
5 doesn't really have any, and how he would go about doing this,
6 and I'm happy to let him explain to you in response to your
7 earlier question how he would basically shadow over somebody
8 in looking at the documents.

9 THE COURT: Okay. Thank you.

10 MR. WUNDERLICH: Thank you.

11 MR. BRINER: Good morning again, Your Honor.

12 THE COURT: Good morning. Go ahead, please.

13 MR. BRINER: Thank you, Your Honor. First off, we do
14 appreciate the exception the Court's made in allowing us to be
15 here today and to present some oral argument on what we feel
16 is a far-reaching request.

17 The first thing I want to note is I think it seems
18 like there's two separate motions being rolled up here into
19 one, and I kind of want to dissect those for the purposes
20 of -- of my remarks. Captiva is moving to compel the
21 production of certain documents that have been withheld on
22 various bases. It's also moving, prosecuting a motion for
23 sanctions, and that would be Mr. Whitledge coming in and
24 inspecting systems, and I think that's an important
25 distinction to keep in mind because the motion to compel --

1 Captiva spends a lot of time talking about documents for which
2 the Court hasn't entered a discovery order, and -- and the
3 nonproduction of those documents, I don't think, under Rule
4 37(b) come into play on the discovery sanctions because that
5 is triggered by someone having a discovery order of the Court
6 entered and then violating it or disobeying it. So on the
7 motion to compel issue, I don't want to waste the Court's time
8 with that. We've gone through that step-by-step in our
9 pleadings, and to explain why the documents that we're
10 withholding we're withholding, we've also brought a set of
11 those documents with us that we can submit for in camera
12 review if the Court sees fit.

13 What is more concerning, as the Court kind of, I
14 think, gleaned from the pleadings, is the sanctions aspect of
15 the motion and their request to inspect our systems by
16 Mr. Whitledge, and it seems to me that's got to come down to
17 showing -- to get that, to even have that in play, okay, they
18 have to show a violation of one of these orders that the Court
19 entered last -- last summer and fall, August of 2012 when the
20 Court said produce the CPS data and the Major Claims Reports
21 and then November when the Court said -- in November, the
22 Court had heard from Captiva about some questions about this
23 data and how it could be presented and what else there might
24 be, and that's -- and November is when the Court came back to
25 us and said, "Okay. Confer with your e-discovery specialist

1 and then report back." Okay. To get any sanction at all,
2 they have to show that we violated those, okay, and -- and we
3 don't think we have, and we think the record shows that we
4 haven't, and if I could jump ahead to one of the questions you
5 asked of Mr. Wunderlich that you said you might reserve for
6 me, which is why in January did we produce a hard copy of
7 this -- it said, "CPS note by Mark Dickhute." I jotted down
8 the date. I think it's November 7 of 2010. Well, that entry,
9 whatever it said, it recited some conversation with Martin
10 Blanchard and no settlements will be entered, something like
11 that. That's a hard copy that someone at Fidelity -- I guess
12 Mark Dickhute; I don't know -- printed out and put in the hard
13 file. Okay. We withheld that from production, and then when
14 the Court told us to produce CPS data -- we originally
15 withheld it from production, and then when the Court said,
16 "Produce all the CPS data," we produced all the CPS data, and
17 I think I've talked to Mr. Wunderlich about this. It's that
18 that very entry that's set forth there in a hard copy that's
19 been printed out and placed in the file is on the summary of
20 entries and briefs that we produced back in August when the
21 Court told us to.

22 So as I understand their complaint, it's not that
23 they didn't know that Mark Dickhute entered a note on
24 November 7 of 2010 saying no settlements but that they hadn't
25 seen a hard copy of it in the form that existed in our file.

1 Now, and the reason --

2 THE COURT: And you didn't think that they were
3 entitled to that?

4 MR. BRINER: It's the same information, Your Honor,
5 and so when we produced the full body of CPS data when the
6 Court told us to, we produced that very same thing. Now,
7 obviously, I didn't -- we didn't go back at that point and
8 say, "Well, what is in the hard file, that may be a printout
9 of what is in CPS," but in terms of having access to that very
10 information, we provided that timely in response to the
11 Court's order.

12 THE COURT: Okay.

13 MR. BRINER: Well, certainly, I think they're
14 entitled to it once the Court ordered that they're entitled to
15 it, and we gave that information to them.

16 THE COURT: Okay. You know what? You all are
17 probably very smart people, maybe a lot smarter than I am, but
18 I just want to kind of cut to the chase here. There's been a
19 lot of discovery disputes in this case, and it's troubling to
20 me to see that because I don't know why a bunch of bright
21 people can't figure this out. Now it's gotten to the point
22 now where one side doesn't trust the other, and maybe there's
23 grounds for that, maybe there isn't, but at some point, this
24 case is either going to go to trial, there's going to be a
25 settlement, or there's going to be a ruling by the Court.

1 Those are the only three possibilities that I'm aware of. So
2 until one of those things happens, you're going to have to get
3 along. You're going to have to figure out a way to provide
4 information to each other in a way that makes sense. It is
5 very troubling to me when I hear about documents being
6 produced piecemeal.

7 MR. BRINER: I'm sorry. The last word, ma'am?

8 THE COURT: Piecemeal.

9 MR. BRINER: Oh, thank you, Your Honor.

10 THE COURT: That's very, very troubling to me, and
11 I'm going to be honest with you. Some of the stuff that has
12 happened here is making Fidelity look like the bad guy. I'm
13 not saying you are, but that's how it's looking.

14 Now let me ask you this. Mr. Whitledge wants to
15 conduct an inspection, which I hope if that inspection is --
16 is authorized and it's completed, that that will put
17 everything to rest here, that Captiva will have had the
18 opportunity to have their person look at the system and
19 determine whether everything's been produced or not, and that
20 will be the end of that.

21 What is Fidelity's concern about having Mr. Whitledge
22 conduct an examination with all of the restrictions on
23 protecting confidential information and the like? What is the
24 problem if, by doing that, this could put all of this, all
25 these disputes to rest?

1 MR. BRINER: Well, and I appreciate the Court's
2 comments, and your message is received, Your Honor. I will
3 say that that's not what they've asked for in their motion.
4 Obviously, there's no limitations on what they've asked for in
5 their motions. The concerns about providing Mr. Whitledge
6 with any access to the system would be that there are -- it
7 would -- without the proper limitations in place, there would
8 be access to personally identifiable information for
9 thousands, tens of thousands, maybe hundreds of thousands of
10 other insureds, other banks, other loans, and things like
11 that, and that's very disturbing to Fidelity as the storer of
12 that information.

13 THE COURT: Is there a way to prevent him from having
14 access to that information? He shouldn't have access to
15 information concerning any other insured. That's --

16 MR. BRINER: Right.

17 THE COURT: -- you know, my feeling, and I don't
18 think that Captiva is interested in anybody else's insurance
19 or coverage, so --

20 MR. BRINER: With respect to the Court thinking that
21 I'm a bright person, much like Mr. Wunderlich, some of these
22 high-level IT issues are beyond me as well, but I did speak
23 with Mr. Rini about that, that kind of topic, in anticipation
24 for today's hearing, and he said that not knowing what Captiva
25 wanted because the pending motion says -- asks for everything

1 without limitation, it would be possible to set up a web
2 conference or a webinar, something like that, exploratory with
3 Mr. Whitledge to show him, hopefully answer the questions he
4 has and show him what's out there if -- if the request is
5 limited and the Court's interested in giving a tailored, a
6 tailored fit like that.

7 THE COURT: I'll be honest with you. I have some
8 concerns about allowing someone unlimited, unfettered access
9 to your computer systems. I don't like that notion at all,
10 especially since it may be that everything that is required to
11 be produced has been produced, so -- but at the same time, I
12 mean you've got to -- I mean you've got to look at it from
13 their point of view. Some of the ways that this information
14 has been coming to the Defendant is very -- would -- would, I
15 think, reasonably give someone cause to think that maybe
16 there's more out there or maybe something isn't being produced
17 or -- or there's some kind of word game going on that -- that
18 they're not part of. So I mean I understand the -- the reason
19 that they've come to this point, and I -- I think that their
20 request may not be unreasonable, an unreasonable one under the
21 circumstances. My only -- my concern is -- not my only
22 concern but one of my concerns is that if this is allowed that
23 it be tailored in some way -- and I don't know how to do that
24 because I -- I -- I wouldn't -- I mean I know how to turn on
25 my computer, I know how to access my email and do a few other

1 things, but when it comes to an actual inspection of a
2 computer -- and Mr. Whitledge did provide some information in
3 his affidavit, but I'm sorry, I'm just not that -- I'm not
4 that advanced.

5 MR. BRINER: From reading -- from reading the cases
6 on this type of topic, Judge, I think I've seen one or two
7 instances where the Court says, "Well, I'm going to allow a
8 tailored -- some kind of tailored access, but I'm going to
9 tell the parties to confer and come up with the boundaries and
10 things like that."

11 THE COURT: Well, that was my -- where I was sort of
12 going because you mentioned -- well, I don't know if Mr. Rini
13 is the person that would set up this webinar thing or if
14 someone else within Fidelity, but it -- or someone outside of
15 Fidelity if you have your own expert, but it seems to me that
16 both sides need to get together and try to figure out how to
17 do this. You know, I don't want to see another discovery
18 motion. You know, I would like you all to figure out a way to
19 put all of this to bed. I mean you're not getting anywhere by
20 filing all these motions other than wasting your client's
21 money. I don't know.

22 So here's -- here's what I propose that you do -- and
23 you tell me if this makes sense or if it makes no sense --
24 that -- that the two of you, Mr. Whitledge and whoever from
25 Fidelity's side, get together and figure out a protocol for an

1 inspection. Does that make sense?

2 MR. WUNDERLICH: May I approach for the moment?

3 THE COURT: Yes.

4 MR. WUNDERLICH: Your Honor, the problem I have with
5 that is -- pull up Mr. Rini's résumé. This is the man they've
6 represented to the Court and to Fidelity as being an
7 e-discovery specialist. They've done that in pleadings with
8 the Court.

9 THE COURT: I have a couple of affidavits from
10 Mr. Rini.

11 MR. WUNDERLICH: Well, let's find the pleading where
12 they've said -- an email and a pleading where they've called
13 him an e-specialist, e-discovery specialist.

14 Your Honor, if you'll look at what's in front of you
15 now, this is an email from Shawn Briner to Steven Hall and
16 myself on September 12th, and this was after the Court had
17 entered an order, and we've continued to try to work with them
18 on this. He says, "We continue to work on the issues that
19 were raised in your 9-7-12 letter. We are in contact with an
20 e-discovery specialist to figure out what else can be done
21 with respect to information in CPS, and they know that they're
22 working under a very short time deadline." And this is after
23 the Court entered its August 17th order telling them to report
24 to the Court using an e-specialist, e-discovery specialist.

25 Now let's go to Mr. Rini's résumé. The man they put

1 up is Mr. Rini. It's hard to -- it's a little -- can you make
2 that a little larger, Steven? Yeah, there you go.

3 This is his résumé that's online. There's nothing
4 on -- he's an actor, Your Honor, who's also Vice President of
5 Special Projects for Fidelity. If you look at the bottom
6 line, he's fluent in legalese.

7 Go to the next page, Steven, 59.

8 Okay. This is his LinkedIn profile. He says
9 basically he's an actor and he's also an Assistant Vice
10 President at Fidelity National. If you look at his
11 affidavits, Your Honor, that he filed with the Court, there's
12 no indication that he even knows what the platform is that is
13 the basis for Fidelity's computer information, and what I'm
14 concerned about here is -- is we're going to end up getting
15 Mr. Rini here who doesn't really understand the system, and
16 Mr. Whitledge can -- if the Court would indulge him for just a
17 couple of minutes, he'd be happy to tell you to what type of
18 person he needs to speak with.

19 THE COURT: Okay. Well, obviously, if this
20 inspection is allowed, Mr. Whitledge will be working with
21 someone from Fidelity, and --

22 MR. WUNDERLICH: My only point is --

23 THE COURT: -- I don't know who that person -- it
24 might not be Mr. Rini. It might be someone else. My -- my
25 point is this, and I don't know who that person would be, and

1 I don't know who Mr. Whitledge thinks that person's
2 qualifications ought to be or even if Fidelity has someone
3 that meets those qualifications.

4 MR. WUNDERLICH: They do, Your Honor.

5 THE COURT: Okay. Well, isn't that something that
6 you all can work out?

7 MR. WUNDERLICH: We can as long as -- my point of
8 making -- my reason for getting back up here and making that
9 point -- I don't want to be in a position where here we're
10 faced with someone who says, "When I push the buttons, it
11 doesn't show up." We need somebody that knows about the
12 internal systems that can speak with Mr. Whitledge, so that
13 they're talking about the platform basis upon which the
14 systems are found, and so as long as the Court's order is
15 clear in that respect, then I'm fine with that, Your Honor,
16 and we're happy to try to do that.

17 THE COURT: Okay. Mr. Briner, I mean surely you all
18 have someone who meets those qualifications.

19 MR. BRINER: Your Honor, I'm sure we do. I mean
20 there has to be some bright lines here, and I think we should
21 be able to select our own designee in that capacity.

22 THE COURT: Right.

23 MR. BRINER: And if that person can't answer
24 Mr. Whitledge's questions, then there might be an issue, but,
25 you know, I think this is -- we would just like some bright

1 lines as we enter into this about it being limited to the
2 information regarding Captiva's claim, for example. Is that
3 something -- what I hear the Court saying -- and I know you
4 don't want to negotiate this right here on the record.

5 THE COURT: No. I think there ought to be
6 limitations on --

7 MR. WUNDERLICH: Your Honor, we're not asking for
8 anything other than information that pertains to this claim --

9 THE COURT: Right. I understand that.

10 MR. WUNDERLICH: -- including emails between
11 supervisors, et cetera.

12 THE COURT: And I think that to the extent that
13 there -- there is a possibility, however remote, that
14 confidential information has to be disclosed in order to get
15 you what you need, I -- that can be dealt with through a
16 confidentiality agreement or something that would bind
17 Mr. Whitley or prevent him from disclosing that information
18 except within the context of this litigation, and I -- I mean
19 this kind of stuff is done all the time, so I don't think
20 that's going to be a problem for you, but I will say this.
21 The whole idea is to get to the bottom of this, and if -- if
22 there are no documents, there are no documents. If there are
23 and they should be disclosed, then they will have to be
24 disclosed, but once -- my hope is that once this process is
25 over that you all will be able to focus on something other

1 than these little discovery squabbles and that you'll be able
2 to move forward with the case, and I don't -- when I say
3 "little discovery squabbles," I'm not trying to minimize the
4 importance of these disputes because I understand they are
5 important, but in the whole scheme of things, they're holding
6 you back, they're keeping you all from moving forward in this
7 case, so -- and I don't want to -- I would like to see this
8 case resolved at some point. I mean it's -- I think we all
9 would. I hope we all would.

10 So I -- one other thing I will say is this. I think
11 it is incumbent on both sides to work in good faith, not just
12 the lawyers but the parties as well. Mr. Whitledge has a lot
13 of qualifications for what he is being proposed to do, and
14 he's going to have to work with someone who has the
15 qualifications to do the kind of searching that is going to
16 have to be done, and I don't know who that person will be, but
17 if it's someone whose qualifications are on my level, that's
18 not going to be good faith.

19 MR. BRINER: Understood.

20 THE COURT: Okay. All right. So how soon can you
21 all get together and work out this protocol for conducting the
22 search?

23 MR. WUNDERLICH: Promptly, Your Honor. We're
24 prepared to do that today.

25 MR. BRINER: Well, we don't have our designee with us

1 here today unless Mr. Dawley has gained a lot of knowledge as
2 we've sat here about the inner workings, so we're glad to --
3 we can speak with Mr. Whitledge today, Your Honor --

4 THE COURT: All right.

5 MR. BRINER: -- and get an idea and then confer with
6 our folks.

7 THE COURT: I think that would be a good idea. Okay.

8 And I will -- here's what I'm going to do. I'm going
9 to give you all -- oh, and where would this inspection take
10 place? Do you all know?

11 MR. WUNDERLICH: Your Honor, I'm assuming it would be
12 in Florida, but I don't know that for sure. Fidelity would
13 have to tell us. I would assume their mainframe computers --
14 do you know?

15 He believes probably Jacksonville, Your Honor.

16 THE COURT: Okay. All right.

17 MR. BRINER: And, Your Honor, I don't -- we don't
18 know the answer to the question. We're going to have to find
19 out more about what Mr. Whitledge's contemplated protocol
20 would be and then answer those questions.

21 THE COURT: All right. So why don't I do this, and
22 if this is too much time or not enough time, let me know. My
23 plan is to give you all 20 days to work out a protocol for --
24 that would allow for the inspection of the Plaintiff's
25 computer system, and I will authorize or appoint Mr. Whitledge

1 to conduct that inspection on behalf of the Defendant. So to
2 that extent, the motion, the Defendant's motion, is granted.
3 I will deal with the other issues raised in the motion later
4 if I need to, but I am going to authorize Mr. Whitledge to
5 represent the Defendant in this inspection, and I'll leave it
6 up to the attorneys and the parties to work out a protocol
7 that would allow for the inspection to be done, taking into
8 account the need for protecting confidential and privileged
9 information. So do you think that's sufficient time or do you
10 think you need -- you can do it in less time than that?

11 MR. WUNDERLICH: I don't know about less time, Your
12 Honor.

13 THE COURT: Okay.

14 MR. WUNDERLICH: I have a federal jury trial or not
15 jury -- a federal trial scheduled for May 20th in Ohio, so I'm
16 in a little bit of a bind in terms of my personal time, so 30
17 days may be more realistic, Your Honor --

18 THE COURT: Thirty.

19 MR. WUNDERLICH: -- in terms of getting the protocols
20 all put together.

21 MR. BRINER: We're just talking about the protocol,
22 not the completion of the project itself?

23 THE COURT: Yes.

24 MR. BRINER: Okay. We -- sure.

25 MR. WUNDERLICH: Because they've got to find

1 somebody, and we've got to find -- Mr. Whitledge lives in
2 Washington, DC.

3 THE COURT: Right.

4 MR. WUNDERLICH: So we've got -- this meeting may
5 have to be in person, I would think.

6 THE COURT: All right. Well, I'll give you 30 days,
7 and once that is done, I would like you all to let me know
8 what you have agreed to, and if there are any protective
9 orders that need to be entered, you can submit proposed
10 protective orders for me to review, and after you set up the
11 protocol, then I will establish a new deadline --

12 MR. WUNDERLICH: Your Honor --

13 THE COURT: -- for --

14 MR. WUNDERLICH: -- I would anticipate they could
15 probably give us some estimate as to how much time they need
16 when they set up those protocols, and we would anticipate
17 getting that from them if that's okay with you.

18 THE COURT: Yeah, that's fine. In fact, I would like
19 to know that when you report to me in 30 days, how much time
20 it will take to do the actual inspection, and then I will
21 establish a deadline for completing that.

22 MR. WUNDERLICH: Thank you, Your Honor.

23 THE COURT: Okay. Okay. Anything else?

24 MR. FRITZLEN: Judge, I just had one question, and
25 I'm not asking for this relief, but I do know that we have a

1 trial set on June 17th. We're now at April 23rd. With 30
2 days, are we still going to try to meet the June trial
3 deadline? That's fine. I'm just asking.

4 THE COURT: I don't see how that's possible. I mean
5 I would like to, and if you -- I mean if you all want to go to
6 trial in June, I mean I've got the time blocked off, so I mean
7 I'm happy to do it, but I don't think you all are going to be
8 ready. Do you think so?

9 MR. FRITZLEN: I guess it's really a question
10 addressed to Rick. I'm not asking for a continuance, and
11 we'll be ready to meet whatever trial deadline.

12 MR. WUNDERLICH: Your Honor, I don't think there's
13 any way given this inspection. I don't know what we're going
14 to find, first of all.

15 THE COURT: Right, right. Well, I will take this off
16 the trial docket for June 12th or whenever it's set, and when
17 I know more about this inspection, I will reset it.

18 MR. WUNDERLICH: Thank you, Your Honor.

19 THE COURT: Okay. And I'll -- I will make every
20 effort to try to remember to give you all some input into a
21 new trial date, so that I don't have to reset it again. Okay.
22 All right.

23 MR. BRINER: Thank you, Your Honor.

24 THE COURT: Thank you all. We're in recess.

25 (Proceedings concluded at 11:26 a.m.)

CERTIFICATE

I, Gayle D. Madden, Registered Diplomate Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 33 inclusive.

Dated at St. Louis, Missouri, this 9th day of June, 2013.

/s/ Gayle D. Madden

GAYLE D. MADDEN, CSR, RDR, CRR

Official Court Reporter